Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2002

ALLAN R. CRUMP,

Petitioner,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE; MICHAEL PIPPINS; JUDY PIPPINS; SALLY J. ZEMAN, Bankruptcy Trustee,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ALLAN R. CRUMP
3334 Sheridan Blvd.
Denver, CO 80212
(303) 455-9105

Petitioner Pro Se

40 pp

QUESTIONS PRESENTED

I. Whether the statutes at large, versus the codification of those statutes in Title 26 of the United States Code, require Notices of Seizure and Sale, pursuant to 26 U.S.C. § 6335(a) and (b), to be left with some person of suitable age and discretion at the usual place of abode where the seizure is made.

II. Whether the Tenth Circuit Panel erred by improperly applying 26 U.S.C. § 6335 (e)(2) and its underlying regulations.

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The Order of the Court of Appeals denying the Petition for Rehearing is unpublished, and is reprinted in Appendix A.

The Tenth Circuit Panel's opinion is reported as In re: *Allan R. Crump v. United States of America; Michael Pippin; Judy Pippin*, 29 Fed. Appx. 556; 2002 U.S. App. LEXIS 1438 (January 30, 2002), and is reprinted in Appendix B.

The opinion of the District Court is reported as *In re: Allan R. and Shirley A. Crump v. United States of America, Michael Pippin, Judy Pippin, and Sally J. Zeman*, 2001 U.S. Dist. LEXIS 2382; 87 A.F.T.R.2d (RIA) 1020 (February 5, 2001), and is reprinted in Appendix C.

JURISDICTION

The Order denying the timely filed Petition for Rehearing of the Court of Appeals in this case was filed on September 10, 2002. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if (mailed U.S.P.S. first class) postmarked by December 9, 2002.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This case involves application of the following statutes and rule.

(a) Notice of seizure
As soon as practicable after seizure of property, notice in

writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a) . . .

26 U.S.C. § 6335.

The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than–

(i) by public auction, or

(ii) by public sale under sealed bids.

26 U.S.C. § 6335(e)(2).

Method of sale. The district director shall sell the property either-- (i) At public auction, at which open competitive bids shall be received, or (ii) At public sale under sealed bids.

26 C.F.R. § 301.6335-1(c)(6).

(b) Deed of real property

In the case of the sale of real property pursuant to section 6335 -

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

26 U.S.C. § 6339.

The officer charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the officer making such distraint, shall be left with the owner or possessor of such goods or effects, **or at his dwelling or usual place of business, with some person of suitable age and discretion**, if any such can be found, with a note of the sum demanded and the time and place of sale;

26 U.S.C. § 3693(a) [1939 Code].

STATEMENT OF THE CASE

On November 3, 1993, the Internal Revenue Service seized the petitioner's residence, which was also the core of petitioner's business operation, for unpaid tax debts. The petitioner filed a Chapter 13 bankruptcy petition on November 29, 1993. On November 30, 1993, the United States filed an ***ex parte*** motion to modify stay, which was summarily granted by the bankruptcy court the same day. On December 1, 1993, the subject property was sold by Roller and Associates to Michael Pippins and Judy Pippins (hereinafter the "Pippins"). The petitioner filed an Adversary Complaint with the Bankruptcy Court to quiet title to the subject property, because the

Bankruptcy Trustee, Sally J. Zeman, argued that the Bankruptcy Estate retained an interest in the property. The petitioner argued that the IRS sale and all issuances therefrom were invalid *ab initio*, due to the IRS' failure to strictly comply with the seizure and sale statutes and regulations.

On September 23, 1994, the United States filed a motion for summary judgment. The United States' summary judgment motion was heard on October 24, 1994. On October 26, 1994, the Bankruptcy Court's Order was entered granting the United States' summary judgment motion. The Bankruptcy Court found that the Declaration of Sharon Quinn filed by the IRS established that the IRS had complied with the seizure and sale statutes. Petitioner appealed to the United States District Court for the District of Colorado from that order and judgment.

On September 7, 2000, an Order was entered reassigning the appeal in District Court from Judge Daniel B. Sparr to Judge Zita L. Weinshienk. On December 13, 2000, the District Court instructed the parties to file a brief addressing all jurisdictional and substantive issues. Petitioner filed his brief on January 4, 2001. United States filed a response brief on January 19, 2001, and the Pippins filed their response brief on January 19, 2001.

On February 5, 2001, the District Court held that "the Bankruptcy Court's decision, as set forth in the Memorandum Opinion And Order entered October 26, 1994, applied the correct legal standards," and it was affirmed. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit.

On Appeal, the petitioner argued (1) the alleged taping of the notices of seizure and sale did not comport with the statute

and due process, (2) the public notice of sale was not published in an appropriate publication, (3) the IRS improperly changed the venue of the auction to a county other than the county in which the property was located, and (4) the auction was conducted by an unauthorized private party. The panel found that the IRS complied with these seizure and sale provisions.

On January 30, 2002, the Tenth Circuit Panel affirmed in an unpublished decision stating that (1) "[b]ecause the IRS served the notices of seizure and sale as required by § 6335(a)-(b) and Crump has not demonstrated a due process violation, summary judgment was appropriate on this ground," (2) "the notification of the sale was properly published," (3) "[b]y signing the notice of public auction sale, Form 2434, the group manager authorized the sale of the Crump residence to take place in a different county," and (4) "[t]he law does not require that the auction be conducted by the Secretary or a delegate."

Petitioner timely filed with the Tenth Circuit his Petition for Rehearing with Suggestion for Rehearing En Banc. On September 10, 2002, the Tenth Circuit denied the Petition: "Appellant's petition for rehearing is denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied."

This timely petition follows.

REASON FOR GRANTING THE WRIT

The Tenth Circuit Panel held that the Internal Revenue Service complied with the seizure and sale provisions of 26

U.S.C. § 6335, et seq., when it seized and sold petitioner's home. The panel ruled that (1) the alleged taping of the Notice of Seizure and Notice of Sale complied with Section 6335(a), and that the alleged posting of these notices on petitioner's door complied with the Due Process Clause; and (2) that the law does not require that an IRS tax auction to be conducted by the Secretary or a delegate, and the regulations implementing Section 6335(e)(2) do not prohibit the Secretary from using the services of a private auctioneer to conduct a tax sale.

The Panel decision conflicts with the decisions of *Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d 1173, 1174-1175 (10th Cir. 1990)[1], and *Title Ins. Co. of Minnesota v. IRS of the United States*, 963 F.2d 297 (10th Cir. 1992). These Tenth Circuit decisions held that the notice requirements of the IRS Code must be strictly enforced. The instant Writ should be granted to maintain uniformity within the Tenth Circuit itself.

The Panel decision conflicts with the following Supreme Court precedents: *Thatcher v. Powell*, 6 Wheat. 119, 125, 5 L.Ed. 221, 222 (1821) (the person invested with such a power must pursue with the precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this Court); *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972) (a prerequisite for summary seizure of property is that

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1. The *Colorado Property* Court "recognized the harshness of this rule," but remarked that the "remedy, if any there is to be, must come from Congress and not the Courts." *Id.* at 1175. See also *Goodwin v. United States*, 935 F.2d 1061, 1065 (9th Cir 1991) (strictly enforcing notice requirements of 26 U.S.C. § 6335); *Kulawy v. United States*, 917 F.2d 729, 735 (2nd Cir 1990) (same).

"the State has kept strict control over its monopoly of legitimate force" by, *inter alia*, providing standards in a narrowly drawn statute); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 [7 AFTR 8847] (1929): "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" Congress has the right to specify a particular method of delivery of notice and when it does so the statutory requirement must be met in order to effect valid notice. The instant Writ should be granted to secure and maintain uniformity of the Tenth Circuit decisions in compliance with Supreme Court precedents.

This Writ involves a question of exceptional importance, because it addresses the level of compliance the IRS must meet when it seizes and sells real property for tax debts, and it involves the correct application of the law (statutes at large) versus a codification of those statutes. The Tenth Circuit Panel decision failed to distinguish between the statutes at large versus the *prima facie* evidence of the law in the 1954 Internal Revenue Code. The statutes at large state that the notices of seizure and sale shall be left with the owner or at his dwelling or usual place of business **with some person of suitable age and discretion**.

Not only does the Panel decision conflict with the express language of the statutes at large, it used faulty statutory construction for 26 U.S.C. § 6335(e)(2), and it is in conflict with authoritative decisions of the Second, Fourth, Fifth, Sixth, and Ninth Circuit Court of Appeals. See, e.g., *Kulawy v. U.S.*, 917 F.2d 729, 734 (2nd Cir. 1990) (the legitimacy of allowing the government to seize and sell property prior to adjudication has long been recognized to depend on strict compliance by

government officials with the procedures prescribed by law); *Margiotta v. United States*, 214 F.2d 518 (2nd Cir. 1954); *Johnson v. Gartlan*, 334 F.Supp. 438 (E.D.Va.1971), *rev'd on other grounds*, 470 F.2d 1104 (4th Cir.), *cert. denied*, 414 U.S. 865, 94 S.Ct. 122, 38 L.Ed.2d 85 (1973) (same); *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975) (we proceed from the proposition that § 6335 permitting the sale at public auction of a taxpayer's land to satisfy a tax deficiency must be strictly construed); *Verba v. Ohio Casualties Insurance Co.*, 851 F.2d 811 (6th Cir. 1988) (constructive notice violates the Due Process Clause); *Goodwin v. United States*, 935 F.2d 1061, 1063-65 (9th Cir. 1991) (§ 6335 requires strict compliance); *Montgomery v. United States*, 1992 U.S. App. LEXIS 24451 (9th Cir. 1992) (same); *Martin v. Rubel Enterprises*, 73 A.F.T.R.2d (P-H) 1762 (9th Cir. 1994) (same); *Anderson v. U.S.*, 44 F.3d 795 (9th Cir. 1995) (same); *Title Ins. Co. v. IRS*, 963 F.2d 297 (10th Cir. 1992) (same).

The panel decision is contrary to the following state courts of appeal: *Jones v. New Pittsburgh Courier Publishing Company*, 469 Pa. 157, 364 A.2d 1315 (Pa. 1976); *Kelly v. Lunding*, 475 N.E.2d 1093, 1096 (Ill.App. 1 Dist. 1985) (The language of this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand); *Village of Dimondale v. Grable*, 240 Mich. App. 553, 618 N.W.2d 23, 30-31 (2000) (absent literal compliance with the provisions of 26 U.S.C. § 6335 (b), a tax sale of land is "void"); *Ruff v. Isaac*, 226 Mich. App. 1; 573 N.W.2d 55, 59 (1998) (strict compliance with these provisions is required).

I. THE TENTH CIRCUIT PANEL ERRED BY NOT APPLYING THE STATUTES AT LARGE, VERSUS THE CODIFICATION OF THOSE STATUTES IN TITLE 26 OF THE UNITED STATES CODE; THE STATUTES AT LARGE REQUIRE NOTICES OF SEIZURE AND SALE, PURSUANT TO 26 U.S.C. § 6335(a) AND (b), TO BE LEFT WITH SOME PERSON OF SUITABLE AGE AND DISCRETION AT THE USUAL PLACE OF ABODE WHERE THE SEIZURE IS MADE

A fundamental principle of administrative tax sales is that the statutory procedure for confiscation of property and the issuances therefrom must be precisely followed. The IR Code requires that owners receive notices of seizure and sale. 26 U.S.C. § 6335. Congress was aware of the strict nature of its requirements when it enacted § 6335, because this Court concluded the matter early in this country's jurisprudence.

> That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power **must pursue with the precision the course prescribed by law**, or his act is invalid, is a principle which has been repeatedly recognized in this Court.

Thatcher v. Powell, 6 Wheat. 119, 125, 5 L. Ed. 221, 222 (1821).

Every Supreme Court and Court of Appeals decision, state and federal, addressing the issue have held that the enabling statutes for seizure, sale, and conveyance of title must be strictly complied with. Without strict compliance, a tax sale cannot

stand, and all conveyances therefrom are void ***ab initio***. *E.g.*, *Aqua Bar & Lounge v. United States*, 438 F. Supp. 655, 657 (E.D. Pa. 1977) (the failure to give required notice of either the notice of seizure or sale is "sufficient grounds for invalidating the sale" even where the owner "received actual written notice through the mail." "Once this Court finds that the prescribed method was not followed, then the Court **must** invalidate the tax sale."); *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975) ("[t]he language of this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land **cannot** stand."); *Bartel v. United States*, 1997 U.S. Dist. LEXIS 23488 (D. Kan. Sep. 29, ~~1997~~) ("the government sale of land cannot stand" without "literal compliance" of § 6335; therefore, an invalid IRS sale does **not** pass all right, title and interest to the purchaser); *Kulawy v. U.S.*, 917 F.2d 729, 734 (2nd Cir. 1990) (the extraordinary powers granted to the government of levying, seizing, and selling property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures prescribed by statute).

In *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991), the Ninth Circuit addressed the issue as follows:

> The Second Circuit, in *Kulawy v. United States*, 917 F.2d 729 (1990), recently addressed the question whether there must be strict compliance with the notice requirements of § 6335. The Second Circuit held that the extraordinary powers granted to the government of levying, seizing and selling property for tax collection purposes without prior judicial hearing **are dependent upon strict compliance with the procedures prescribed by statute**. Id. at 734.

> . . . the necessity for complying with § 6335(d) could be no greater than the necessity for complying with §§ 6335(a) and 6335(b). In following the Second Circuit, **we hold that the language and purpose of § 6335(a) and § 6335(b) require that the government be held accountable for failure to strictly comply with the procedures prescribed by the two provisions**. *See Kulawy*, 917 F.2d at 735.
>
> Moreover, because § 6335 requires strict compliance, **Goodwin did not have the burden of demonstrating prejudice**. *Cf. id.*
>
> Although we would not apply a literal reading of a statute that required a result demonstrably in conflict with the drafter's intentions, no such apparent conflict exists here. [Citation omitted]. Congress has set forth **precise requirements for notice of seizure and sale of property** in tax deficiency situations. "[W]hen the government seeks to enforce the laws, **it must follow the steps which Congress has specified**." *Reece*, 506 F.2d at 971. The government did not give Goodwin the notice required by § 6335. Accordingly, as between Goodwin and the government, the seizure and sale of the Gladstone property was invalid.

Goodwin, 935 F.2d at 1065. [Emphasis added].

A. The Statutes at Large require the Notices of Seizure and Sale to be left with some person of suitable age and discretion at the usual place of abode where the seizure is made.

Petitioner obtained copies of all seizure and sale documents

by filing a request pursuant to the provisions of the Freedom of Information Act. The IRS' documents, and other papers filed by the United States in the Bankruptcy proceedings, disclose that Revenue Officer Sharon Quinn seized the subject property and a sale was scheduled for 10:00 a.m., December 1, 1993. The Service improperly delegated its authority to a private auctioneer, Roller and Associates, to sell the subject property.

On December 1, 1994, Roller and Associates purportedly sold the subject property by auctioning same, and the tax sale was in a county other than where the property was seized. The Pippins attended the auction conducted by Roller and Associates and were the successful bidders. The Pippins received the Director's Deed on or about August 17, 1994.

In the Declaration of Revenue Officer Sharon Quinn at paragraph 3, attached to the United States' motion for summary judgment, Quinn testified that: "On November 3, 1993, I delivered copies of the following documents ***to*** Allan R. and Shirley A. Crump ('the Crumps') by leaving the copies at their residence." (Emphasis added).

The petitioner's Freedom of Information Act request produced Revenue Officer Sharon Quinn's Investigation History sheets of the Crumps. Officer Quinn's handwritten Investigation History sheets, completed contemporaneously with the event, expressly state that she had no contact with the petitioner or his wife when she went to their residence on November 3, 1993: "FC [field call] this am to enity w/GM J.Agee, 3 CID agents & 1 agent from Inspection, TPNI, ***left*** [various forms] ***in envelope taped to front door, no contact W/TPS***." Officer Quinn herself admits that she allegedly taped an envelope to the petitioner's front door, allegedly containing various IRS' documents. There was no contact with the

petitioner or his wife, according to Officer Quinn, and therefore she neither "deliver[ed] copies of the ... documents ***TO*** Allan R. and Shirley A. Crump," nor to some person of suitable age and discretion.

The petitioner and his wife both testified that they did not receive the notices allegedly posted on their residence.

Petitioner argued that the notices of seizure and sale must be served personally or left at the usual place of abode with some person of suitable age and discretion where the seizure is made. The Tenth Circuit Panel rejected this argument by ruling that the "statute, however, does not require this, it only requires that the notice[] 'be left at [the] usual place of abode ... where the seizure is made.' 26 U.S.C. § 6335(a)." The Panel decision completely ignores that the statute at large expressly requires that when the notices are left at the usual place of abode, they must be left with some person of suitable age and discretion.

26 U.S.C. § 6335(a) was derived from 53 Stat. 452, §§ 3693(a) and 3701(a) of the 1939 Code, and § 6335(b) was derived from 53 Stat. 452, §§ 3693(b) and 3701(b).

> The officer charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the officer making such distraint, shall be left with the owner or possessor of such goods or effects, **or at his dwelling or usual place of business, with some person of suitable age and discretion**, if any such can be found, with a note of the sum demanded and the time and place of sale;
>
> 26 U.S.C. § 3693(a).

As previously noted, 53 Stat. 452, §§ 3693(a) and 3701(a) were combined to make § 6335(a), which is the codified version of the statutes at large contained in the 1954 Code. The legislative history accompanying the passage of the 1954 Code, Section 6335, states that there was no material change from existing law. House Report 1337 and Senate Report 1622. The Panel erred by applying the codified version of these statutes at large instead of the statute itself. The combined statutes (§§ 3693(a) and 3701(a)) unequivocally mandate that the notices of seizure and sale be left at the owner's usual place of abode with "some person of suitable age and discretion."

Notwithstanding the fact that the prior laws have been relocated and assigned different sections in the 1954 Code, the underlying statutes remain the law.[2] Title 26 of the United States Code has not been enacted into positive law. Thus, Title 26 is not itself the law but only "prima facie" evidence of the law. 1 U.S.C. § 204(a); see also *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 449 & n.4, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993).

The United States Statutes at Large are "legal evidence" of the law, 1 U.S.C. § 112 (1994), whereas the titles of the United States Code only serve as "*prima facie*" evidence of the law unless they are enacted as "positive law," in which case they too

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2. See, e.g., *United States v. Welden*, 377 U.S. 95, 98 n.4, 12 L. Ed. 2d 152, 84 S. Ct. 1082 (1964) (holding that a "change of arrangement" by a codifier to a section not enacted as positive law "should be given no weight").

serve as legal evidence of the laws. 1 U.S.C. § 204(a) (1994);[3] see also *Stephan v. United States*, 319 U.S. 423, 426, 87 L. Ed. 1490, 63 S. Ct. 1135 (1943) (per curiam) (Statutes at Large prevail over prima facie portions of U.S.C.).

It is well-settled that although the United States Code is *prima facie* evidence of what the law is, 1 U.S.C. § 204(a), the Statutes at Large constitute legal evidence of what the law is. *Id.* § 112. When the two differ, the Statutes at Large control. *United States v. Welden*, 377 U.S. 95, 98 n.4, 12 L. Ed. 2d 152, 84 S. Ct. 1082 (1964); *Stephan v. United States*, 319 U.S. 423, 426, 87 L. Ed. 1490, 63 S. Ct. 1135 (1943) (per curiam); *Five Flags Pipe Line Co. v. Department of Transp.*, 272 U.S. App. D.C. 221, 854 F.2d 1438, 1440 (D.C. Cir. 1988); see also

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3. 1 U.S.C. § 204(a) (1970) provides:

In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States -

(a) United States Code. - The matter set forth in the edition of the Code of Laws of the United States current at any time shall together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

United States Nat'l Bank v. Independent Ins. Agents of America, Inc., 124 L. Ed. 2d 402, 113 S. Ct. 2173, 2179 (1993).

The Statutes at Large control, and these combined statutes require that notices of seizure and sale be given to the owner of the property or left with some person of suitable age and discretion at the owner's usual place of abode. It is undisputed that, instead, the notices were allegedly taped to petitioner's door.

It is undisputed that petitioner did not receive personal service of the Notices of Seizure or Sale. Because petitioner had a ownership interest in the property to require service of the notices of seizure and sale, the United States' failure to give such notice renders the seizure, sale, and subsequent deed void.

Consequently, the Tenth Circuit Panel decision affirming the district court's grant of summary judgment was error both because (1) it failed to accept the facts pled in the declaration of petitioner as true on a motion for summary judgment and (2) its ruling was erroneous as a matter of law.

Because the courts below decided these questions of federal tax law in a way that conflicts with relevant decisions of this Court, a writ of certiorari should issue.

II. THE COURT ERRED BY IMPROPERLY APPLYING 26 U.S.C. § 6335(e)(2) AND ITS UNDERLYING REGULATIONS

It is undisputed that a private party, Roller and Associates, conducted the tax sale of the subject property. The Panel held that "[t]he law does not require that the auction be conducted by the Secretary or a delegate. Pertinent statutory provisions require only that the Secretary 'prescribe the manner and other

conditions of the sale of property seized by levy.' 26 U.S.C. § 6335(e)(2). The regulations prescribing the manner and conditions of the sale do not prohibit the Secretary from using the services of a private auctioneer. See 26 C.F.R. § 301.6335-1(c)." Simply stated, the number of things the regulations do not prohibit is unlimited, but that is not how the law works.

First, the law **does require** that the sale/auction be conducted by the Secretary or a delegate. The sale of seized property **must be conducted** by public auction or by public sale under sealed bids. § 6335(e)(2)(A)(i) and (ii). According to the Panel, that can be anybody. Appellant expressly pointed the Panel to the regulation stating that the Secretary's delegate must conduct the sale. 26 C.F.R. § 301.6335-1(c)(5). This is the very regulation that the Panel cites to support its ruling by turning the entire regulatory scheme upside down. § 301.6335-1(c)(5) specifically requires the District Director[4] [or his delegate] to conduct the sale: "Method of sale. The district director ***shall sell*** **the property**... ." The Panel's decision that "[t]he law does not require that the auction be conducted by the Secretary or a delegate" makes a mockery of this express regulatory language.[5]

26 U.S.C. § 6335(e)(2) requires the Secretary to promulgate regulations: "The Secretary **shall** by regulations prescribe the

---

4. The District Director is the delegate of the Secretary who can redelegate. The District Director did not delegate any power to a private party nor can he.

5. "Method." Must mean the mode of operating, or the means of attaining an object.

manner[6] and other conditions[7] of the sale of property seized by levy." The Panel's decision that the regulations "do not prohibit the Secretary from using the services of a private auctioneer" is contrary to every legal doctrine in existence, and it is a perversion of American Jurisprudence. Congress clearly did not state that the IRS can conduct the sale anyway it chooses unless the Secretary by regulation prohibits it. Nevertheless, according to the Panel, anything that is not prohibited can be done.[8]

There are three types of regulations: (1) legislative or

---

6. "Manner" is the mode of procedure or way of acting. Gee, that must mean that Congress instructed the Secretary that he must proscribe regulations controlling the sale procedures. Obviously, according to the Panel, the Secretary forgot the several volumes proscribing what is prohibited.

7. "Conditions." Well, it is plural, so it must mean more than one. "Conditions of sale." Must mean the terms upon which sales are made at auction. Again, the statute does not say that the Secretary shall proscribe regulations explaining prohibited conditions of sale or the prohibited manner of sale, since Congress must have meant if it is not authorized then it IS prohibited.

8. The regulations do not prohibit any of the three hundred million citizens or residents in the United States from conducting the auction either, but they do say that the District Director "shall sell" the property. The regulations do not say that the District Director shall cause the property to be sold by anyone s/he pleases.

substantive, (2) interpretative, and (3) procedural. Regulations issued pursuant to a specific authorization from or direction by Congress in particular sections of the IR Code are legislative or substantive. Thus, Congress specifically required the Secretary to promulgate regulations proscribing the manner and other conditions of the sale of property seized by levy in § 6335(e)(2), and not regulations prohibiting things. Congress did not say that the Secretary or his delegates can do anything not prohibited by the regulations. Instead, they can only do what is authorized. According to the Panel's decision, if the Secretary did not prohibit conduct by regulation, the IRS can do anything that any IRS official desires to do; including, allowing anyone to conduct the tax sale. Well, actually, the Panel did say do anything you want if the regulations do not prohibit it.

When the Treasury promulgates a legislative regulation, the regulation has the force and effect of law. *Anderson, Clayton & Co. v. United States*, 562 F.2d 972 (5th Cir. 1977); *Union Elec. Co. v. United States*, 305 F.2d 850, 854 (Ct. Cl. 1962). A reviewing court has no authority to substitute its judgment as to the content of the regulation, because Congress has placed maximum discretion in the agency and not in the court. We are far past the time when Courts seeking to take away individuals' rights should return to basics. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). But that was 200 years ago, now look at us.

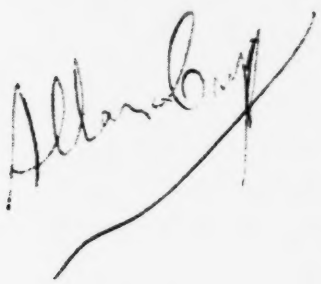
Because the Panel has ignored the plain language of the Statutes at Large requiring notices of seizure and sale to be left at the usual place of abode, if the owner cannot be personally served, with some one of suitable age and discretion, and the

Panel has ignored the plain language of the statutes and regulations, petitioner believes the Panel has not only clearly erred, but intentionally erred by refusing to enforce petitioner's and others statutory rights.

Because the Tenth Circuit Panel decision is contrary to relevant decisions of this Court, a writ of certiorari should issue.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue. The decisions below must be reversed.



Respectfully submitted,

Allan R. Crump
3334 Sheridan Blvd.
Denver, CO 80212
(303) 455-9105

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1069

In re: ALLAN R. CRUMP and SHIRLEY A. CRUMP,

Debtors,

and

ALLAN R. CRUMP,

Plaintiff - Appellant,

and

SHIRLEY A. CRUMP,

Plaintiff,

-vs-

MICHAEL PIPPIN; UNITED STATES OF AMERICA;
JUDY PIPPIN,

Defendants - Appellees,

and

SALLY J. ZEMAN, Chapter 13 Trustee,

Defendant.

ORDER

Filed September 10, 2002

Before KELLY, BALDOCK, and LUCERO, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
By: Deputy Clerk

APPENDIX B

In re: ALLAN R. CRUMP and SHIRLEY A. CRUMP, Debtors. ALLAN R. CRUMP, Plaintiff-Appellant, and SHIRLEY A. CRUMP, Plaintiff, v. UNITED STATES OF AMERICA; MICHAEL PIPPIN; JUDY PIPPIN, Defendants-Appellees, and SALLY J. ZEMAN, Chapter 13 Trustee, Defendant.

No. 01-1069

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

29 Fed. Appx. 556; 2002 U.S. App. LEXIS 1438; 2002-1 U.S. Tax Cas. (CCH) P50,217; 89 A.F.T.R.2d (RIA) 777

January 30, 2002, Filed

NOTICE:
RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
(D. Colo.). (D.C. No. 94-Z-2530).

Crump v. United States (In re Crump), 2001 U.S. Dist. LEXIS 2382 (D. Colo. 2001)

DISPOSITION:
Affirmed.

COUNSEL:
For ALLAN R. CRUMP, Plaintiff - Appellant: Allan R. Crump,

Thornton, CO.

For SHIRLEY A. CRUMP, Plaintiff: Shirley A. Crump, Denver, CO.

For MICHAEL PIPPIN, Defendant - Appellee: John F. Reha, Arckey & Reha, Littletown, CO.

For UNITED STATES OF AMERICA, Defendant - Appellee: William G. Pharo, Jr., Asst. U.S. Attorney, Office of the United States Attorney, Denver, CO. Robert L. Baker, United States Department of Justice, Tax Division, Washington, DC. Arthur P. Yoon, United States Department of Justice, Trial Division, Washington, DC. Christopher H. LaRosa, United States Department of Justice, Tax Division, Washington, DC.

For JUDY PIPPIN, Defendant - Appellee: John F. Reha, Arckey & Reha, Littleton, CO.

JUDGES:
Before KELLY, BALDOCK, and LUCERO, Circuit Judges.

OPINIONBY:
Carlos F. Lucero

OPINION:

ORDER AND JUDGMENT *

* The case is unanimously ordered submitted without oral argument pursuant to Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court

generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appellant Allan R. Crump, proceeding pro se, appeals the district court's order affirming the bankruptcy court's order quieting title in real property. The property in question was Crump's residence, which the Internal Revenue Service ("IRS") seized to pay his tax debt. At the IRS auction of Crump's residence, appellees Michael Pippin and Judy Pippin ("Pippins") were the successful bidders. Crump filed for bankruptcy on the eve of the auction, so the underlying quiet title action was filed as an adversary proceeding in the bankruptcy court. Following the bankruptcy court's entry of a summary judgment that quieted the title in the Pippins, Crump appealed to the district court. We review the district court's order affirming the bankruptcy court's entry of summary judgment and affirm.

On appeal, Crump asserts that the sale of his residence was void because the IRS failed to adhere strictly to the procedures dictated by statute. He claims (1) service of the notices of seizure and sale did not comport with due process because the notices were merely taped to the door of his residence, (2) the public notice of the sale was not published in an appropriate publication, (3) the IRS improperly changed the venue of the auction to a county other than the county in which the property was located, and (4) the auction was conducted by an unauthorized private party.

"In reviewing the district court's decision affirming the bankruptcy court's determination, this court will apply the same standards of review employed by the district court. We, therefore, review de novo the bankruptcy court's decision

granting appellees summary judgment." *Woodcock v. Chem. Bank (In re Woodcock)*, 144 F.3d 1340, 1342 (10th Cir. 1998) (citations omitted).

I

Appellant claims that service of the notices of seizure and sale did not comply with *26 U.S.C. § 6335*(a)-(b) and violated his due process rights. The statute states the notices shall be given by the Secretary [of the Treasury] to the owner of the property ... or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address.

§ 6335(a); see also § 6335(b); *26 C.F.R. § 301.6335-1(a)*-(b).

Crump represents that he was neither served the notices personally, nor were they left with any person of competent age and discretion. The IRS counters that IRS Revenue Officer Sharon Quinn delivered the notices to the Crump residence by placing them in an envelope and taping the envelope to the front door of the residence on November 3, 1993. In response, Crump denies receiving the notices and argues that the posting of the notices on the door of the property does not satisfy the service requirements of *26 U.S.C. § 6335*(a)-(b). He maintains that this statute should be interpreted to require that the documents be left with a person of competent age and discretion who resides at the abode. The statute, however, does not require this, it only requires that the noticed "be left at [the] usual place of abode ... where the seizure is made." *26 U.S.C. § 6335*(a).

To the extent Crump claims posting of notice can never comport with due process requirements, the Supreme Court has

rejected this position. As noted in *Greene v. Lindsey*, short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him. 456 U.S. 444, 452-53, 72 L. Ed. 2d 249, 102 S. Ct. 1874 (1982). Crump does not allege that the posting of the notices on the door of his residence was not a "reliable means of acquainting interested parties of the fact that their rights are before the courts." *Id.* at 454. (internal quotations omitted). Absent such a showing, Crump has not demonstrated that minimum standards of due process have been denied. Because the IRS served the notices of seizure and sale as required by § 6335(a)-(b) and Crump has not demonstrated a due process violation, summary judgment was appropriate on this ground.

II

The Secretary is required to "cause a notification [of the sale] to be published in some newspaper published or generally circulated within the county wherein such seizure is made." *26 U.S.C. § 6335*(b). We are urged to conclude that the auction sale was void because one public notice of the sale was not published in a publication of general interest and the other was not published by the Secretary of the Treasury. Notices were published in two newspapers, The Daily Journal and The Denver Post. Contending that The Daily Journal is aimed at the construction trade, appellant complains that placing notice of the sale in this publication did not comport with the statute because it is not a publication of general interest. The notice published in The Denver Post was inadequate, according to Crump, because it was placed by the private firm that conducted

the auction rather than the Secretary. There is no dispute that The Denver Post is a newspaper of general interest and circulation.

The statute requires the Secretary to "cause a notification to be published," it does not require that the Secretary actually place every notice. Accordingly, publication in The Denver Post was sufficient. Furthermore, the bankruptcy court took judicial notice that The Daily Journal is published and generally circulated in the county where the real property was seized. Therefore, publication in The Daily Journal also satisfied the statutory requirements of *26 U.S.C. § 6335*(b). We conclude **[*559]** that the notification of the sale was properly published.

III

Statutory requirements necessitate that "the place of sale shall be within the county in which the property is seized, except by special order of the Secretary." *26 U.S.C. § 6335*(d). Regulations allow the relevant district director to order the sale outside of the county where the property is located if it appears that substantially higher bids could be obtained outside of the county. *26 C.F.R. § 301.6335-1(c)(1)*.

The record refutes Crump's claim that the IRS did not issue a "special order" or determine that substantially higher bids could be obtained in a different county. The authority to change the sale venue was properly delegated to the group manager. By signing the notice of public auction sale, Form 2434, the group manager authorized the sale of the Crump residence to take place in a different county. (R. Vol. I, Doc. 24; id., Vol. II, Doc. 45, at 111.) The delegation order provides that signing a Form 2434 approves a sale outside the county in which the property was seized. Accordingly, the Form 2434, together with the

delegation order, qualifies as the "special order" required by the statute.

Additionally, the IRS determined that the Crump residence would be "more likely to receive higher bids and more money for the taxpayer's interest" if it were put in an upcoming auction in a different county. (R. Vol. I, Doc. 19, Ex. F.) This statement satisfies the requirement that the district director conclude that substantially higher bids may be obtained if the sale is held outside of the county of seizure. No particular procedure or documentation is required. Therefore, the sale in a county other than the county of seizure was authorized.

IV

Appellant contends that the seizure and sale of his property was void because the auction was conducted by a private party, rather that the Secretary or a delegate. The law does not require that the auction be conducted by the Secretary or a delegate. Pertinent statutory provisions require only that the Secretary "prescribe the manner and other conditions of the sale of property seized by levy." *26 U.S.C. § 6335*(e)(2). The regulations prescribing the manner and conditions of the sale do not prohibit the Secretary from using the services of a private auctioneer. See *26 C.F.R. § 301.6335-1(c)*. Accordingly, summary judgment was appropriate on this ground.

The judgment is **AFFIRMED**. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge

APPENDIX C

In re: ALLAN R. and SHIRLEY A. CRUMP, Debtors/Appellants, v. UNITED STATES OF AMERICA, MICHAEL PIPPIN, JUDY PIPPIN, and SALLY J. ZEMAN, Appellees.

Civil Action No. 94-Z-2530

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

2001 U.S. Dist. LEXIS 2382; 87 A.F.T.R.2d (RIA) 1020

February 2, 2001, Decided

February 5, 2001, Filed, Entered

PRIOR HISTORY:
Bankruptcy Case No. 93-22711-DEC, Adversary Case No. 94-1322-RJB.

DISPOSITION:
Bankruptcy Court's Memorandum Opinion And Order, entered October 26, 1994, affirmed. Judgment entered in favor of appellees and the Appeal dismissed. Appellee United States' Motion For Leave To Appear By Telephone At February 21, 2001 Hearing denied as moot.

COUNSEL:
ALLAN R. CRUMP, (Plaintiff), appellant, Pro se, Denver, CO U.S.A.

SHIRLEY A. CRUMP, (Plaintiff), appellant, Pro se, Denver, CO U.S.A.

For USA, (Defendant), appellee: Arthur P. Yoon, Christopher H. La Rosa, U.S. Department of Justice, Washington, DC U.S.A.

For USA, (Defendant), appellee: William G. Pharo, United States Attorney's Office, Denver, CO USA.

For MICHAEL PIPPIN, (Defendant), JUDY PIPPIN, (Defendant), appellees: John F. Reha, Arckey & Reha, L.L.C., Littleton, CO U.S.A.

For SALLY J. ZEMAN, Chapter 13 Trustee (Defendant), appellee: Chad S. Caby, Chapter 13 Trustee, District of Colorado, Celia Jean Foegen, Jay S. Radetsky, P.C., Denver, CO U.S.A.

JUDGES:
ZITA L. WEINSHIENK, Senior Judge, United States District Court.

OPINIONBY:
ZITA L. WEINSHIENK

OPINION:

ORDER AND JUDGMENT

The matter before the Court is the Bankruptcy Appeal of debtors/appellants, appealing the decision quieting title to real property entered by Bankruptcy Judge Roland J. Brumbaugh in Adversary Case No. 94-1322 on October 26, 1994. The case was transferred to this Court on September 6, 2000. Briefs were filed in January, 2001, by appellants and appellees. After an examination of the briefs and the record, the

Court has determined that oral argument would not materially assist the determination of this appeal. In reviewing the decision of the Bankruptcy Court, factual findings will be rejected only if clearly erroneous and conclusions of law will be reviewed *de novo*. See *In re Kirkland, 86 F.3d 172, 174 (10th Cir. 1996).*

The property in question was the personal residence of Allan and Shirley Crump. On November 3, 1993, the Internal Revenue Service (IRS) seized appellants' residence for non-payment of taxes. The IRS notice of sale indicated the property would be sold on December 1, 1993. Appellants filed a Chapter 13 bankruptcy petition on November 29, 1993, triggering the automatic stay provision of *11 U.S.C. § 362.* The IRS filed an *ex parte* motion to modify stay on November 30, 1993, which was granted by the Bankruptcy Court. The property was sold to appellees Michael and Judy Pippin (the Pippins) on December 1, 1993.

Appellants filed a *pro se* adversary complaint on June 2, 1994 as an action to quiet title to the property in themselves, alleging that the sale to the Pippins was invalid because the IRS had failed to follow the required regulations governing notice, publication and sale of the property. (Rec. on App., Vol. I, DN 1.) The Bankruptcy Court granted summary judgment for appellees the United States and the Pippins, quieting title in the Pippins on October 26, 1994. (Rec. on App., Vol. I, DN 27 & 28.)

In the adversary proceeding in Bankruptcy Court, and in a December 19, 1994, brief to the District Court on appeal, appellants raised the issue of whether subject matter jurisdiction existed in the Bankruptcy Court to hear this matter, arguing that the subject property was no longer part of the bankruptcy estate. This argument was not renewed in appellants' amended brief on

appeal, filed January 4, 2001. Nevertheless, the Court will consider the issue *sua sponte*. "Insofar as subject matter jurisdiction is concerned, it has long been recognized that a federal court must, *sua sponte*, satisfy itself of its power to adjudicate in every case and at every stage of the proceedings." *Tafoya v. United States Department of Justice,* 748 F.2d 1389, 1390 (10th Cir. 1984).

Appellants' challenge to subject matter jurisdiction was based on comments made by Bankruptcy Judge Donald E. Cordova in a July 20, 1994, hearing on a motion by the Pippins to modify stay. In that hearing, Bankruptcy Judge Cordova stated that relief from stay was not necessary because the debtors conceded they no longer held any equitable interest in the property. (Vol. I, DN 19, pp 2-4.) Nevertheless, the Bankruptcy Judge went on to lift the stay in his holding. Appellants characterize the Bankruptcy Judge's comments as an abandonment of the property that officially ended subject matter jurisdiction in the Bankruptcy Court. The Court disagrees.

The Court agrees with Bankruptcy Judge Brumbaugh's ruling of October 26, 1994, that this matter constitutes a core proceeding pursuant to *28 U.S.C. § 157.* (Vol. I, DN 27, p. 3.) Appellants brought the adversary proceeding to challenge the IRS sale of the property, arguing the Bankruptcy Court had improperly lifted the stay on November 30, 1993, and authorized the sale. Appellants alleged that they were the true owners because the sale was void due to procedural irregularities. Appellants also alleged the sale constituted a fraudulent conveyance pursuant to *11 U.S.C. § 548.* These allegations demonstrate the adversary proceeding concerned an action by the debtor challenging a post-petition conveyance of property. If the challenge was upheld, the property would remain part of the bankruptcy estate available for the

satisfaction of creditors. n1 The Bankruptcy Court had jurisdiction in the adversary proceeding to determine whether the property was actually property of the estate pursuant to *28 U.S.C. 157*(b)(2). This Court has jurisdiction to hear the appeal pursuant to *28 U.S.C. § 158*(a).

> n1 Appellants are mistaken in assuming the property would return to them. Bankruptcy Judge Cordova's comments in response to the Crumps' assertion that they had no equity in the property did not constitute a formal abandonment of the property by the Bankruptcy Court.

Appellants argue that the IRS did not comply with the notice requirements of *26 U.S.C. § 6335*(a) and (b) when they taped the notice of seizure and sale to the front door of appellants' residence rather than personally serving them or mailing notice to them, and that such inadequate notice was an unconstitutional violation of appellants' right to Due Process under the Fifth Amendment. The pertinent regulation states that notice of seizure may be "left at [the owner's] usual place of abode or business if he has such within the internal revenue district where the seizure is made." *26 U.S.C. § 6335*(a). Notice of sale may be effected in the same manner. *26 U.S.C. § 6335*(b). Notice of sale and seizure were taped to the door of appellants' usual place of abode which was within the appropriate internal revenue district, satisfying the requirements of § 6335(b).

Furthermore, the actions of the IRS satisfied the constitutional requirements of "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of their action and to afford them an opportunity to present their objections. "*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652

(1950). Addressing the efficacy of posting notice on the front door of a residence, the Supreme Court has stated:

> Short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

Greene v. Lindsey, 456 U.S. 444, 452-53, 72 L. Ed. 2d 249, 102 S. Ct. 1874 (1982). Appellants do not argue any circumstance that would make such notice ineffective. This was a constitutionally valid method for giving notice to appellants.

Appellants contend that publication of the notice of sale was also inadequate because The Daily Journal was not a paper "published or generally circulated within the county wherein seizure was made" as required by *26 U.S.C. § 6335*(b), but was a special publication for the construction trade. Appellants do not address the fact that publication of sale was also made in The Denver Post, however, which was a paper of general circulation in the county, satisfying the publication requirements of § 6335(b).

The Court agrees that the sale of the property was proper even though conducted by Roller and Associates, a private auction company, rather than by an "officer, agency, or employee of the Treasury Department." *26 U.S.C. § 7701*(a)(12)(A)(i). Authority to conduct the sale was properly delegated to these private auctioneers by the Secretary of the Treasury's agents. The Secretary is required to "prescribe the

manner and other conditions of the sale of property seized by levy," not to personally conduct each public auction. *26 U.S.C. § 6335*(e)(1)(A) and (e)(2).

The Court rejects appellants' argument that the grant of summary judgment should be reversed because the United States was not a proper party to the case as moot. The Pippins joined the United States appellee in its motion for summary judgment in the adversary proceeding.

Upon reviewing the briefs, the case law, the relevant statutory provisions, and the record of the case, the Court concludes that the Bankruptcy Court's decision, as set forth in the Memorandum Opinion And Order entered October 26, 1994, applied the correct legal standards. The Court also determines that the Bankruptcy Court's factual findings are not clearly erroneous. Accordingly, it is

ORDERED that the Bankruptcy Court's Memorandum Opinion And Order, entered October 26, 1994, is affirmed. It is

FURTHER ORDERED that judgment is entered in favor of appellees and the Appeal is dismissed. It is

FURTHER ORDERED that appellee United States' Motion For Leave To Appear By Telephone At February 21, 2001 Hearing is denied as moot. It is

FURTHER ORDERED that the hearing set for February 21, 2001, at 10:30 a.m. is vacated.

DATED at Denver, Colorado, this 2 day of February, 2001.

C-8

ZITA L. WEINSHIENK, Senior Judge

United States District Court

FEB 10 2003

No. 02-889

In the Supreme Court of the United States

ALLAN R. CRUMP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
DAVID ENGLISH CARMACK
ROBERT L. BAKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a sale of certain real property owned by petitioner and his wife was conducted in compliance with Section 6335 of the Internal Revenue Code, 26 U.S.C. 6335.

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In the Supreme Court of the United States

No. 02-889

ALLAN R. CRUMP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7) is not published in the *Federal Reporter*, but is *reprinted in* 29 Fed. Appx. 556. The opinion of the district court (Pet. App. C1-C8) is unofficially reported at 87 A.F.T.R.2d (RIA) 1020.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2002. The petition for rehearing was denied on September 10, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 3, 1993, the Internal Revenue Service (IRS) seized the residence of petitioner and his wife for their nonpayment of past due internal revenue taxes.[1] The IRS Revenue Officer served the notices of seizure and sale by placing them in an envelope taped to the front door of the residence. Pet. App. B3-B4, C3. The IRS thereafter delegated responsibility for conducting the sale of the property to Roller and Associates, a private auction company. *Id.* at B7, C6.

2. After the IRS seized the real property, petitioner and his wife filed a Chapter 13 bankruptcy proceeding. Pet. App. B3, C3. The IRS obtained an order in that proceeding lifting the automatic stay on the sale of the real property and, on December 1, 1993, sold the property to respondents Michael and Judy Pippin. Following the sale, petitioner and his wife commenced an adversary proceeding in the bankruptcy court to quiet title in the property in their favor. *Id.* at C3. The bankruptcy court granted summary judgment for the United States and quieted title in the Pippins. *Id.* at B3, C3.

On February 5, 2001, the district court entered an order affirming the bankruptcy court's judgment. Pet. App. C1-C8. The district court determined that, by taping the notices of seizure and sale to the front door of petitioner's "usual place of abode," the IRS satisfied the service requirements of Section 6335(a) and (b) of the Internal Revenue Code and the requirements of due process. Pet. App. C5. The court further held that Section 6335(e)(1)(A) and (e)(2) of the Internal Revenue Code authorize the IRS to delegate authority to con-

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[1] Petitioner's wife, Shirley A. Crump, has since died.

duct the sale of seized property to a private auction company. Pet. App. C6-C7.

3. The court of appeals affirmed. Pet. App. B1-B7. The court rejected petitioner's argument that Section 6335 requires that notices of seizure and sale be left with a person of competent age and discretion who resides at the abode. The court pointed out that "[t]he statute * * * does not require this" and instead "only requires that the notice[s] 'be left at [the] usual place of abode . . . where the seizure is made.'" Pet. App. B4 (quoting 26 U.S.C. 6335(a)).

The court also rejected petitioner's argument that the seizure and sale of the property was void because the sale was conducted by a private party. The court held that "[t]he regulations prescribing the manner and conditions of the sale do not prohibit the Secretary from using the services of a private auctioneer." Pet. App. B7.

In a petition for rehearing, petitioner argued for the first time that, (i) unlike Section 6335 of the Internal Revenue Code of 1986 (codified at 26 U.S.C. 6335), the statutes at large that contain the Internal Revenue Code of 1939 set forth an additional requirement that, to be valid, notices of seizure and sale must be left with some person of suitable age and discretion at the usual place of abode where the seizure is made, (ii) that the statutes at large, rather than the codified provisions of the Internal Revenue Code of 1986, should govern this matter and (iii) that the requirement for personal service contained in the statutes at large was not met in this case. The court of appeals denied the petition for rehearing without addressing petitioner's new argument. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The government may seize and sell property upon which it has levied to collect a tax debt. 26 U.S.C. 6331(b). Section 6335 of the Internal Revenue Code provides procedural requirements for such seizures and sales. *Powelson* v. *United States*, 979 F.2d 141, 143 (9th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991).[2]

Section 6335(a) requires that notice of seizure and notice of sale either shall be given to the owner of the property "or shall be left at his usual place of abode or business * * * ." 26 U.S.C. 6335(a) (emphasis added). The declaration of the IRS Revenue Officer established that she went to petitioner's residence to serve him with notice of seizure and notice of sale, but that no one was home. Her declaration further established that she then left the notices at petitioner's home, as the statute provides. Pet. App. B4; see Pet. 12-13. The court of appeals thus correctly held (Pet. App. B4) that leaving the notices at petitioner's residence satisfied the plain terms of the statute.

2. Petitioner contends (Pet. 11-16) that, although Section 6335(a) of the 1986 Code does not require that notices of seizure and sale be left with some person of suitable age and discretion at the usual place of abode where the seizure is made, the statutes at large that set forth Sections 3693(a) and 3701 of the Internal Revenue

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[2] A failure of the Internal Revenue Service to comply with the procedural requirements of Section 6335 can invalidate the seizure or sale. *Goodwin* v. *United States*, 935 F.2d at 1065.

Code of 1939, ch. 36, 53 Stat. 452, 453, do contain such a requirement. Petitioner claims that this requirement of personal service in the 1939 Code should govern in any conflict with Section 6335 of the 1986 Code, which petitioner claims has not been enacted into positive law. These contentions are both untimely and incorrect.

a. This new argument was first presented by petitioner in the petition for rehearing, and the court of appeals denied the petition without addressing it. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. * * * 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)). Petitioner has failed to demonstrate any reason why an exception to this rule should be made in this case.

b. In any event, petitioner's new contention is based on the faulty premise that the Internal Revenue Code of 1939 is still in effect. The Internal Revenue Code of 1954 was enacted on August 16, 1954, ch. 736, 68A Stat. 3, and was redesignated as the Internal Revenue Code of 1986 on October 22, 1986, Pub. L. No. 99-514, § 2(a), 100 Stat. 2095. Section 7851(a)(6) of the 1986 Code, which was enacted as part of the 1954 Code, repealed the provisions of the 1939 Code upon which petitioner relies.[3] Moreover, Section 6335 of the Internal Revenue Code of 1954, which is found at 68A Stat. 785-786, is now part of the Internal Revenue Code of 1986.

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[3] Except for a minor amendment, Section 7851 has remained unchanged since its enactment. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1906(b)(13)(A), 90 Stat. 1834.

26 U.S.C. 6335. That provision of the 1986 Code, and not its predecessor in the 1939 Code, is controlling here.

c. Furthermore, contrary to petitioner's contention, there is no material difference between Section 6335 of the 1986 Code and the corresponding provisions of the 1939 Code, as applied to this case. Section 6335 of the 1986 Code was derived from Sections 3693, 3695, 3701, and 3712 of the 1939 Code. Section 6335(a) of the 1986 Code is descended from Section 3701(a) of the 1939 Code (entitled "Notice to Owner" and located in "Part II-Distraint on Real Estate"). 53 Stat. 453. Both Section 6335(a) and its predecessor, Section 3701(a) of the 1939 Code, provide that notice of seizure may be given to the owner of the seized property by leaving written notice at his "usual place of abode." Petitioner's reliance on Section 3693(a) of the 1939 Code (entitled "Account and Notice to Owner" and located in "Part I-Distraint on Personal Property") is misplaced. 53 Stat. 451, 452. That Section applied only to seizures of *personal* property. When personal property was seized, that statute required a copy of "an account of the goods or effects distrained" to be "left with the owner or possessor of such goods or effects, or at his dwelling or usual place of business, with some person of suitable age and discretion, if any such can be found." 26 U.S.C. 3693 (1940). That Section had no relevance to the procedures to be followed in seizing real property of the type involved in this case.[4]

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[4] Petitioner errs in claiming (Pet. 6-8) that the decision in this case conflicts with decisions of this Court, of other circuits and of the Tenth Circuit itself. The decisions cited by petitioner stand for a general rule that the relevant Sections of the Internal Revenue Code are to be strictly construed. Nothing in the decision below conflicts with those decisions.

3. Petitioner errs in claiming (Pet. 17) that the IRS improperly delegated responsibility for conducting the sale of his residence to a private auction company. Petitioner contends that a private auction company is not an "officer, employee, or agency of the Treasury Department" within the meaning of Section 7701(a)(12)(A)(i) and therefore cannot qualify as a "delegate" of the Secretary of the Treasury in conducting the sale of the property. Pet. 17-20.

The manifest flaw in petitioner's argument is that neither the statute nor its implementing regulations (26 C.F.R. 301.6335-1(c)(6))[5] requires that the Secretary or an officer or employee of the Treasury conduct the sale. Section 6335(e)(1)(A) of the Code directs the Secretary of the Treasury to determine the minimum bid price and to resolve whether the government will seek to purchase the property at that price. 26 U.S.C. 6335(e)(1)(A). And, Section 6335(e)(2) directs the Secretary to "prescribe the manner and other conditions of the sale of property seized by levy." 26 U.S.C. 6335(e)(2). Nothing in either of these provisions or their implementing regulations, however, requires the Secretary or any other Treasury officer or employee personally to conduct the sale of the seized property. Moreover, nothing in these provisions bars the Secretary or his delegate from authorizing a private party to conduct the sale. See 26 C.F.R. 301.6335-1(c)(6). A private party may therefore conduct such a sale when the Secretary or his delegate authorizes that party to do so. *Andrew Crispo Gallery, Inc.* v. *Commissioner*, 68

[5] Petitioner cites (Pet. 17) to 26 C.F.R. 301.6335-1(c)(5). That regulation was redesignated as 26 C.F.R. 301.6335-1(c)(6) by T.D. 8691, 1997-1 C.B. 207, 208.

T.C.M. (CCH) 1187 (1994), rev'd on other grounds, 86 F.3d 42 (2d Cir. 1996).

In this case, the private auctioneer was properly authorized to conduct the sale of the property. The Secretary of the Treasury has delegated the power to collect taxes to the district directors of the IRS. 26 C.F.R. 301.6331-1(a); see Pet. App. B7. The Denver District Director delegated to the IRS Revenue Officer the power to collect the unpaid tax liabilities of petitioner and his wife and, in particular, to seize and sell their real property to satisfy those liabilities. In addition, the Revenue Officer was authorized to retain the services of a private auctioneer to conduct that sale. Pet. App. C6; B. Doc. 16, Quinn Decl. ¶¶ 1, 2.[6] Petitioner's assertion that the sale conducted by private auctioneer in this case was unauthorized is therefore plainly incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
DAVID ENGLISH CARMACK
ROBERT L. BAKER
Attorneys

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[6] "B. Doc." references are to the docket control numbers assigned to the documents in the original record by the Clerk of the bankruptcy court.